Supreme Court, U.S.
FILED
JAN 6 1993
OFFICE OF THE CLERK

No. 92-631

In the Supreme Court of the United States

OCTOBER TERM, 1992

JAMES EDWARD SMITH ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause was violated when the government introduced evidence at trial under Fed. R. Evid. 404(b) concerning petitioner James Smith's participation in a prior drug conspiracy, for which he had previously been convicted.

2. Whether the district court properly admitted evidence of petitioner James Smith's prior drug trafficking activities.

3. Whether the district court erred in not submitting the issue of the voluntariness of petitioner Richard Smith's confession to the jury.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Brown v. *Ohio*, 432 U.S. 161 (1977)	6
Estelle v. *McGuire*, 112 S. Ct. 475 (1991)	9
Garrett v. *United States*, 471 U.S. 773 (1985)	6
Grady v. *Corbin*, 495 U.S. 508 (1990)	5, 6
Huddleston v. *United States*, 485 U.S. 681 (1988)	6
Richardson v. *Marsh*, 481 U.S. 200 (1987)	8
United States v. *Allen*, 798 F.2d 985 (7th Cir. 1986)	8
United States v. *Dansker*, 537 F.2d 40 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977)	8
United States v. *Felix*, 112 S. Ct. 1377 (1992)	5
United States v. *Figueroa*, 618 F.2d 934 (2d Cir. 1980)	9
United States v. *Grassi*, 602 F.2d 1192 (5th Cir. 1979), vacated, 448 U.S. 902 (1980)	8
United States v. *Groce*, 682 F.2d 1359 (11th Cir. 1982)	11
United States v. *Haynes*, 881 F.2d 586 (8th Cir. 1989)	7
United States v. *Legendre*, 657 F.2d 238 (8th Cir.), cert. denied, 454 U.S. 1037 (1981)	7-8
United States v. *Rawle*, 845 F.2d 1244 (4th Cir. 1988)	7
United States v. *Sebetich*, 776 F.2d 412 (3d Cir. 1985), cert. denied, 484 U.S. 1017 (1988)	11
United States v. *Smith*, 759 F. Supp. 304 (E.D. Va. 1991)	3
United States v. *Wagoner*, 713 F.2d 1371 (8th Cir. 1983)	7

Cases—Continued: Page

United States v. *Williams*, 577 F.2d 188 (2d Cir.), cert. denied, 439 U.S. 868 (1978) 9

Constitution, statutes and rules:

U.S. Const. Amend. V (Double Jeopardy Clause) 5
18 U.S.C. 922(g) 2
18 U.S.C. 1952(a) 2
18 U.S.C. 3501(a) 10
21 U.S.C. 841(a)(1) 2
21 U.S.C. 843(b) 2
21 U.S.C. 846 2
Fed. R. Evid.:
Rule 403 ..... 7, 8
Rule 404(b) 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-631

JAMES EDWARD SMITH ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10), is unpublished, but its judgment is noted at 966 F.2d 1446 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1992. On August 25, 1992, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari until October 8, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted of interstate travel to promote drug trafficking, in violation of 18 U.S.C. 1952(a); possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and use of a telephone to facilitate drug trafficking, in violation of 21 U.S.C. 843(b). Petitioner James Smith (James) was also convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g), and distribution of heroin, in violation of 21 U.S.C. 841(a)(1). Petitioner Richard Smith (Richard) was also convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846, and distribution of cocaine and heroin, in violation of 21 U.S.C. 841(a)(1). James was sentenced to a total of 384 months' imprisonment, ten years' supervised release, and a $575,000 fine. Richard was sentenced to 121 months' imprisonment and five years' supervised release. The court of appeals affirmed. Pet. App. 1-10.

1. James operated a drug trafficking organization in the District of Columbia and Virginia. On February 6, 1988, he was arrested for drug trafficking and jailed in Alexandria, Virginia. While in jail, James directed Richard, Reginald Smith, Excel Alexander, and others to remove drugs, drug paraphernalia, weapons, and money from James's safe houses in the District of Columbia. The drugs and the firearms were subsequently stored in commercial warehouses in Richmond, Virginia. Gov't C.A. Br. 3.

Reginald Smith distributed heroin to Richard for resale, but the heroin did not sell because it was of

poor quality. As a result, Richard became deeply indebted to Reginald. In 1988, James, then incarcerated in the federal prison in Petersburg, Virginia, directed an accomplice to deliver additional heroin to Reginald Smith for resale. In 1989, Richard purchased cocaine from a new dealer. Thereafter, he distributed heroin and cocaine to some friends. In the fall of 1989, federal agents seized heroin, cocaine, other drugs, and firearms from a commercial warehouse controlled by Reginald Smith. Later, Richard admitted to law enforcement agents that he had sold cocaine and heroin. Gov't. C.A. Br. 4-5.

2. In March 1988, James pleaded guilty in the U.S. District Court for the District of Columbia to the charge of conspiring to distribute narcotics between 1979 and 1988. The instant indictment initially charged both James and Richard with conspiring to distribute heroin, but the district court dismissed that charge as to James on double jeopardy grounds. *United States* v. *Smith*, 759 F. Supp. 304 (E.D. Va. 1991). At trial, the district court permitted the government to present evidence of James's drug trafficking activities during the period covered by the District of Columbia conspiracy charge. First, Excel Alexander, who testified that James had directed him to remove incriminating evidence from James's safe house following James's arrest, also testified that he had sold drugs for James since the 1960s and the 1970s. Second, Alexander and witness Reginald Smith testified that Richard had belonged to James's drug organization during the middle 1980s. Third, Detective Barbara Lyles testified that in 1985, James told her that he no longer stored drugs where he lived

because a police raid on one of his apartments had narrowly missed discovering drugs that were stored there. James also told her that he normally diluted his heroin.[1] The district court gave a limiting instruction to the jury with respect to the similar acts evidence that was admitted into evidence.[2] Gov't C.A. Br. 6-7.

3. The court of appeals affirmed. First, the court held that the admission of similar acts evidence against James did not violate the double jeopardy ban against a second prosecution for the same offense. The court explained that the use of James's prior drug crimes as evidence against him was not the same as prosecuting him for those prior acts. Pet. App. 3-4. It also held that the district court properly admitted petitioners' prior drug trafficking activities to show motive, intent, and common scheme or plan and that the trial court's limiting instruction kept that evidence confined to its proper bounds. Pet. App. 4-5. The court held that the district court properly did not instruct the jury on the voluntariness of Richard's confession because Richard did not raise the voluntariness issue before the jury.[3]

---

[1] There was also testimony from Reginald Smith, Charles Smith, Devoyce Caviness, and DEA Agent Veronica Baker regarding James's prior drug trafficking activities. The district court, however, instructed the jury to disregard that evidence as to James Smith. C.A. App. 240-241.

[2] The court instructed "that these defendants are not on trial for any prior crimes or other misconduct that may have come out into evidence." C.A. App. 237-238.

[3] The court of appeals also rejected James's claims that he was improperly denied a severance (Pet. App. 5) and that the government improperly used his immunized testimony at trial

ARGUMENT

1. James Smith contends (Pet. 14-21) that the admission into evidence of his drug trafficking activities while participating in the conspiracy of which he had earlier been convicted violated the Double Jeopardy Clause. He relies on *Grady* v. *Corbin*, 495 U.S. 508 (1990), in which this Court held that the Double Jeopardy Clause bars a second prosecution if "to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 510.

In *United States* v. *Felix*, 112 S. Ct. 1377, 1385 (1992), this Court reaffirmed "the established doctrine that a conspiracy to commit a crime is a separate offense from the crime itself," and that an individual may accordingly be prosecuted separately for a conspiracy and for substantive offenses that are named as overt acts committed in furtherance of that conspiracy. Thus, even if the specific acts for which James was prosecuted in this case had been named as overt acts in the conspiracy information to which he pleaded guilty, separate prosecution for those acts would not have been barred. Since the specific acts for which James was prosecuted in this case were not named as overt acts in the conspiracy information to which he previously pleaded guilty, the result in this

---

(Pet. App. 6-7); Richard's claim that his confession was involuntary (Pet. App. 7-8); and petitioners' joint claim (Pet. App. 9-10) that the district court's final instructions were incorrect in several respects. Petitioners have not renewed those claims before this Court.

case follows *a fortiori* from *Felix*. Indeed, two of the five counts of which he was convicted involved acts that did not occur until April and May 1989, more than one year after his March 16, 1988, guilty plea. See Pet. App. 42, 44. Cf. *Garrett* v. *United States*, 471 U.S. 773, 790-793 (1985).

James argues (Pet. 19-21) that *Felix* is distinguishable because his conspiracy prosecution occurred before his prosecution on the substantive narcotics counts, while in *Felix* the defendant was first prosecuted for the substantive offense and then for the conspiracy. Nothing in this Court's reasoning in *Felix*, however, turns on the order in which the offenses were prosecuted. To the contrary, if two prosecutions charge a defendant with the same offense, the order in which they are brought has no bearing on the double jeopardy analysis. See *Grady*, 495 U.S. at 521 n.11; *Brown* v. *Ohio*, 432 U.S. 161, 168-169 (1977) ("Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.").

2. James Smith next contends (Pet. 21-31) that the district court erred in admitting evidence of his prior drug trafficking activities under Fed. R. Evid. 404(b).

Under Fed. R. Evid. 404(b), evidence of a defendant's similar acts is admissible if "probative of a material issue other than character," *Huddleston* v. *United States*, 485 U.S. 681, 686 (1988); if "the jury c[ould] reasonably conclude that the act occurred and that the defendant was the actor," *id.* at 689; and if its probative value is not "substantially outweighed by the danger of unfair prejudice," *id.* at 687 (quoting

Fed. R. Evid. 403). Rule 404(b) provides that among the "issue[s] other than character" for which such evidence can be admitted are "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

The district court did not abuse its discretion in admitting the similar acts evidence in this case. First, Detective Lyles's testimony that James had told her that a police raid had taught him not to keep drugs at his apartment was relevant because it showed James's motive in summoning his accomplices to his jail cell and directing them to remove his drugs and firearms from his safe houses. See *United States* v. *Wagoner*, 713 F.2d 1371, 1375-1376 (8th Cir. 1983). Detective Lyles's testimony about James's practice of diluting his heroin showed James's method of operation, which helped explain why the heroin that he sold to Reginald Smith was of such poor quality. See *United States* v. *Rawle*, 845 F.2d 1244, 1247-1248 (4th Cir. 1988); *United States* v. *Haynes*, 881 F.2d 586, 589-590 (8th Cir. 1989).

Second, Alexander's testimony that he had distributed drugs for petitioners in the past, and Reginald Smith's testimony that he had previously distributed drugs in partnership with Richard, was relevant because it showed the relationship of trust between the members of James's drug organization and thus buttressed the evidence that petitioner continued to deal with them. The relationship of trust between James and Alexander also explains why James selected Alexander to hide his drugs and firearms while he was in jail. See *United States* v. *Legendre*, 657 F.2d 238, 242 (8th Cir.), cert. denied, 454

U.S. 1037 (1981); *United States* v. *Dansker*, 537 F.2d 40, 58 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977).

The probative force of the above evidence was not substantially outweighed by the danger of unfair prejudice. The references to James's other crimes were brief and unremarkable. Moreover, the district court's limiting instruction confined the similar acts evidence to its proper purposes.[4]

James's argument (Pet. 27) that the similar acts evidence should have been excluded because he was willing to stipulate that he was a drug dealer is meritless. Although a district court should consider a defendant's willingness to stipulate in conducting the balancing process under Fed. R. Evid. 403, it is not required to force the government to forgo its evidentiary presentation by accepting a tactical stipulation by the defendant, particularly where the stipulation is not an adequate substitute for the proffered evidence with regard to the purposes for which the evidence is being offered. See *United States* v. *Allen*, 798 F.2d 985, 1001 (7th Cir. 1986); *United States* v. *Grassi*, 602 F.2d 1192, 1197 (5th Cir. 1979), vacated on other grounds, 448 U.S. 902 (1980). Here, the proffered evidence showed James's methods of conducting his drug operation and his relationship with his co-conspirators, which was important in helping the jury understand the charges against him

---

[4] James's contention (Pet. 26) that the testimony of Baker, the Smiths, and Caviness was improperly admitted overlooks the fact that the district court subsequently instructed the jury to disregard their testimony. The jury is presumed to have followed the court's instruction. See *Richardson* v. *Marsh*, 481 U.S. 200, 206-207 (1987).

and his conduct in committing the charged offenses. The stipulation that James was "a drug dealer, that he was dealing drugs, and that he was convicted in the District of Columbia in 1988," Pet. App. 128, would not have served as an adequate substitute for the evidence that showed James's modus operandi, his relationship of trust with particular individuals, and his motive for removing the drugs and firearms from his safe houses.[5]

3. Finally, Richard Smith contends (Pet. 32-37) that the district court erred by not submitting the

---

[5] The Second Circuit follows the practice of requiring the district court to postpone admission of similar acts evidence offered to prove intent until rebuttal so as to determine whether the defendant, in his case, takes the issue of intent out of the case. See *United States* v. *Figueroa*, 618 F.2d 934, 939 (2d Cir. 1980). Even the Second Circuit, however, finds no reversible error when the evidence is admitted during the government's case-in-chief and, as in this case, the defendant rests without presenting evidence. See *id.* at 939 n.1; *United States* v. *Williams*, 577 F.2d 188, 191 (2d Cir.), cert. denied, 439 U.S. 868 (1978). Petitioner's contention (Pet. 25) that similar act evidence may not be introduced "[u]nless and until [the defendant] dispute[s] the issue of intent" is contrary to this Court's recent decision in *Estelle* v. *McGuire*, 112 S. Ct. 475, 481 (1991), where the Court rejected the same argument and explained:

> [T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense. In the federal courts "[a] simple plea of not guilty . . . puts the prosecution to its proof as to all elements of the crime charged." *Mathews* v. *United States*, 485 U.S. 58, 64-65 (1988).

issue of the voluntariness of his confession to the jury.

State police officer D.R. Carter went to Richard's home to seek his cooperation in the investigation of a related drug offense. Because Richard was not at home, Carter left a note on the front door that was addressed to Richard's wife and that asked Richard to contact Carter and stated that he "[would] be able to save himself some serious problems by talking with us." Several days later, Richard called Carter, who told Richard that he was under investigation, asked Richard to cooperate with him, and advised him to hire a lawyer. Richard then went to the FBI office, where he met with Carter and FBI agent Terry Carney. After they gave Richard his *Miranda* warnings and told him that he was not under arrest, Richard admitted that he had sold some heroin and cocaine during the summer of 1989. Pet. App. 7.

Prior to trial, Richard moved to suppress his confession on the ground that it was involuntary. He maintained that Officer Carter's note coerced him into confessing. After a hearing, the district court denied the motion and ruled that the confession would be admitted into evidence. Gov't C.A. Br. 14-15.

Section 3501(a) of Title 18 provides that a district court shall initially determine the issue of the voluntariness of a defendant's confession. If it concludes that the confession was voluntary, it shall admit the confession, and "shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." The court's duty to instruct the

jury on the voluntariness issue, however, arises only if the defendant actually raises the issue before the jury. If the defendant fails to raise the voluntariness issue before the jury, a voluntariness instruction is not required. See, *e.g.*, *United States* v. *Sebetich*, 776 F.2d 412, 422 n.16 (3d Cir. 1985) (collecting cases), cert. denied, 484 U.S. 1017 (1988); *United States* v. *Groce*, 682 F.2d 1359, 1365-1366 (11th Cir. 1982).

During the trial on the merits, Richard did not raise an issue of the voluntariness of his confession before the jury. During his opening statement, his counsel virtually conceded that his confession was voluntary. He explained that Richard had confessed to having sold small amounts of heroin and cocaine because he wanted to cooperate with the authorities, and he maintained that the government had indicted him because he refused to admit that he was a member of James's drug ring. C.A. App. 128-129.[6] During the defense case, Richard introduced Officer Carter's note into evidence, but he did not present any evidence that his confession was involuntary. During his closing argument, Richard's counsel contended that the government failed to prove that he had confessed, because it had not produced a tape recording of the confession, but he did not contend that the confession was involuntary. Gov't C.A. Br. 18-20.

Richard's contention (Pet. 36) that he raised the voluntariness issue by introducing Officer Carter's

---

[6] Richard's counsel stated that Richard "told [the FBI] the truth" and that "[h]e cooperated." C.A. App. 128-129. Counsel also told the jury that Richard "didn't tell them what they wanted to hear" and "today, * * * he sits * * * indicted." *Id.* at 129.

note at trial is meritless. As his counsel's conduct at trial demonstrates, the note was introduced merely to show what prompted Richard to come to the FBI office to confess; Richard did not argue to the jury that the note showed that his confession was involuntary. In any event, the fact-bound question whether the court of appeals correctly apprehended the purpose for which the note was introduced does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS E. BOOTH
Attorney

JANUARY 1993